No. 9885

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA, on the relation of Charles J. McColgan, as State Franchise Tax Commissioner,

Appellant,

vs.

JOHN HOWARD BRUCE,

Appellee.

OPENING BRIEF FOR APPELLANT

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APPELLANT'S OPENING BRIEF

STATEMENT AS TO JURISDICTION

The complaint alleged that the district court had jurisdiction (1) under section 41(1) Title 28 of the United States Code because this is a controversy between citizens of two States involving an amount in excess of $3,000, exclusive of interest and costs; (2) under section 41(5) of Title 28 of the United States Code, because this is an action for taxes; and (3) because Article IV, section 1 of the United States Constitution, commonly known as the full

faith and credit clause, compelled the district court to exercise jurisdiction. The complaint alleged that Charles J. McColgan is a resident of California and that John Howard Bruce is a resident of Nevada. These allegations (which were not denied, see Record, page 89) are on page 5 of the Transcript of Record. The district court held that it had jurisdiction.

Jurisdiction vests in this Court by virtue of section 225(a) of Title 28, United States Code. Judgment below was entered on March 22, 1941. (Record, page 6.) The notice of appeal was filed on June 13, 1941. (Record, page 7.) Bond on appeal was filed the same day. (Record, pages 95-98.) On July 22, 1941 an order was filed by the district court judge extending the time for filing the record until August 23, 1941. (Record, page 99.) On August 6, 1941 the record was filed in this Court. (Record, page 101.) On August 8, 1941, Appellant filed with the clerk of this Court a designation of record and a statement of points to be relied on in this appeal. (Record, pages 101, 102, 95, 7.)

As the jurisdiction of the district court and of this Court is the subject of extended discussion hereinafter, the above statement is believed sufficient at this point.

STATEMENT OF THE CASE

This is an action on behalf of the State of California to collect income taxes owing by Appellee. Appellee, John Howard Bruce, lived with his wife in California during 1936 and until May 10, 1937, and was a resident of California during that period. Early in 1936 Appellee bought a ticket in the Irish Sweepstakes, and his name appeared on the counterfoil which was sent to the Sweepstakes officials in Ireland. Soon the drawing occurred in Ireland, and Appellee's ticket drew a horse. Then Appellee sold a half interest in his ticket to a New York syndicate for $5,000, but at all times Appellee kept the ticket in his possession. About May 26, 1936, the race was run and the horse drawn by Appellee's ticket won first place, entitling the holder or holders of the ticket to the first prize of $150,000. Payment to Appellee of his winnings was not made until June 25, 1937, however, because one William Leathe had filed suit in Ireland claiming a half interest in the winnings. Leathe withdrew his suit for a payment of $5,000 and payment was then made to Appellee of $59,356.66. This payment was made to Appellee's account in a Reno bank, as on or about May 10, 1937 Appellee and his wife had left California and had become residents of Nevada.

Appellee actually received only $59,356.66 of the $150,000, because $75,000 was paid to the New York syndicate, $10,000 was paid to Appellee's attorneys, and $5,000 was paid to Leathe.

On June 10, 1937, the California Franchise Tax Commissioner, acting under the California Personal Income Tax Act, issued a jeopardy assessment against Appellee, assessing him $4,345.84 on net income of $70,000. This tax has not been paid and this action was instituted to collect it.

There are two general issues presented by this case. The first issue is whether the Federal courts have and must exercise jurisdiction in an action brought on behalf of a State against a resident of another State to collect taxes due the former State. The district court held that Federal courts do have such jurisdiction, but held that no tax was due to the State on behalf of which the action was brought. The second issue therefore is whether Appellee owes the tax involved. This issue is subdivided into three problems: one, whether California had jurisdiction to tax; two, whether it exercised that jurisdiction; three, whether the amount of the assessed tax is too large. The latter problem depends for determination on a consideration of Irish law, and this, together with the consideration of whether California had jurisdiction to tax, introduces a subsidiary problem, namely whether the district court should have admitted evidence offered by Appellant to prove Irish law. The offer of evidence was opposed by Appellee on the ground that the court would take judicial notice of Irish law, and the court did not admit the evidence.

SPECIFICATION OF ERRORS

The district court held that it had jurisdiction, and Appellant urges that it held correctly on that issue. One of the points to be relied on by Appellant is that the district court had jurisdiction, but that point cannot be included in Appellant's specification of errors, since the district court decided that issue favorably to Appellant.

The errors committed by the district court from which Appellant asks relief are:

1. The district court erroneously failed to hold that the California Personal Income Tax Act imposed an income tax on Appellee, and in the amount assessed;

2. The district court erroneously failed to hold that California had jurisdiction to impose that tax;

3. The district court erroneously failed to admit in evidence proof of Irish law.

SUMMARY OF ARGUMENT

In the argument hereinafter Appellant will show:

A. That the district court had jurisdiction and that this Court has appellate jurisdiction because:

I. The United States Supreme Court has held that Federal courts have jurisdiction of actions to collect State taxes, for taxes are not penal obligations;

II. This action is between citizens of different States and involves over $3,000, thus coming within section 41(1), Title 28, United States Code;

III. This action is one arising under a law providing for internal revenue, thus coming within section 41(5), Title 28, United States Code;

IV. Article IV, section 1 of the United States Constitution compels the Federal courts to give full faith and credit to State laws and therefore to enforce this obligation;

V. This Court has jurisdiction of the appeal under section 225(a), Title 28 of the United States Code;

B. Appellee owes the tax which this action was instituted to collect, because:

I. California had jurisdiction to impose the tax because the income matured while Appellee was a resident of California and also because the income was derived from property in California;

II. The California act imposed the tax because it taxed residents on all their net income and nonresidents on all income from California, and treated illicit income as taxable income, and it taxed Appellee in at least the amount assessed because, like the Federal act, it taxed Appellee on all

the income to which he had an enforceable claim and he could have obtained the entire $150,000 as separate property;

C. The Federal courts will not take judicial notice of foreign law and therefore the district court should have admitted the offered proof of Irish law.

* * * * *

ARGUMENT

A. The United States District Court had jujrisdiction of this action, and this Court has jurisdiction of this appeal

I. The United States Supreme Court has held that Federal district courts have original jurisdiction in actions by States to collect taxes due from nonresidents

In two decisions the United States Supreme Court has held that the Federal district courts have jurisdiction in actions of this character. These decisions are *Massachusetts* v. *Missouri,* 308 U. S. 1, 60 Sup. Ct. 39, and *Milwaukee County* v. *M. E. White Co.,* 296 U. S. 268, 56 Sup. Ct. 229.

In *Massachusetts* v. *Missouri,* supra, a State instituted an action in the United States Supreme Court against residents of another State to collect taxes. The United States Supreme Court refused to exercise jurisdiction because relief was available in other courts, among them the Federal district courts.

In *Milwaukee County* v. *M. E. White Co.,* supra, the United States Supreme Court held that a Federal district court had jurisdiction of an action brought by a State subdivision to collect a judgment for State taxes. The court held that full faith and credit must be given to a judgment for taxes, and held that such a judgment is not penal in nature for the obligation to pay taxes is not penal. While this case involved an action to enforce a judgment for taxes, in the later case of *Massachusetts* v. *Missouri,* supra, the United States Supreme Court cited *Milwaukee County* v. *White* as authority in a case where an action was instituted to collect taxes and not to collect a judgment for taxes.

Thus the jurisdiction of the Federal district courts in this type of case has been upheld by the Supreme Court.

II. The Federal district court had jurisdiction because this is an action between citizens of different States involving an amount in excess of $3,000

Title 28, section 41(1) of the United States Code [1] conferred jurisdiction on the district court in this case. While a State is not a citizen of itself and hence does not come within the terms of the grant of jurisdiction,[2] an action instituted by State officers on behalf of a State is within the grant of

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[1] "The district courts shall have original jurisdiction as follows: First. Of all suits of a civil nature . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and . . . (b) is between citizens of different States . . ."

[2] *Stone* v. *South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799; *Postal Tel. Cable Co.* v. *Alabama*, 155 U. S. 482, 15 Sup. Ct. 192.

jurisdiction.[3] While an action against a State officer where a State is the real party in interest is treated as an action against the State in construing the prohibition of the Eleventh Amendment,[4] the fact that a State is the real party in interest in this case did not deprive the district court of jurisdiction because there is no constitutional prohibition against a State's instituting suits in the Federal courts. On the contrary, clause 1 of section 2 of Article III of the Constituion confers jurisdiction on the Federal courts in actions by a State against the citizens of other States. Thus the rule that the application of constitutional provisions is governed by substance, not form, does not compel a relinquishment of jurisdiction in this case because a State officer is suing on behalf of his State.

Section 28 of the California Personal Income Tax Act[5] authorizes the Franchise Tax Commissioner to bring this action. Thus he is the qualified moving party and as such is a party to the controversy. His interest in the recovery is not purely formal, for the act imposes on him the duty of enforcing the tax,[6] and requires that all taxes due

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[3] *Missouri, K & T. Ry. Co.* v. *Missouri Railroad etc. Com'rs.*, 183 U. S. 53, 22 Sup. Ct. 18; *Ex Parte Nebraska*, 209 U. S. 436, 28 Sup. Ct. 581.

[4] *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164; *Ex Parte Young*, 209 U. S. 123, 28 Sup. Ct. 441.

[5] "The commissioner may bring an appropriate action (whether in the form of a common law action of debt or indebitatus assumpsit, or a code or other action), in any court of competent jurisdiction in the United States or in a foreign country, in the name of the people of the State of California, to recover the amount of any taxes and interest due under this act. The Attorney General or the counsel for the commissioner of this State must prosecute such action."

[6] Sec. 32. "The commissioner shall administer and enforce the tax herein imposed . . ."

under it shall be paid to the commissioner,[7] and also names the commissioner as statutory defendant in actions to contest any disputed tax.[8] In consequence, the commissioner is comparable to the administrator of an estate, and the decisions that the citizenship of the administrator of an estate is controlling in determining jurisdiction under section 41(1)[9] support the conclusion that the citizenship of the commissioner is the controlling factor. The fact that the action is entitled "People of the State of California on the relation of McColgan" does not compel a contrary conclusion.[10] Thus the requisite diversity of citizenship exists and the terms of section 41(1) are satisfied.

As this action involves an amount in excess of $3,000, exclusive of interest and costs, it is an action of which the Federal district court had jurisdiction on the ground of diversity of citizenship. As we pointed out in the preceding portion of this brief, the fact that the action is for State taxes does not remove it from the scope of section 41.

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[7] Sec. 14(d). "The tax . . . imposed by this act, shall be paid to the commissioner . . ."

[8] Sec. 21. " . . . any taxpayer . . . may bring an action against the commissioner for the recovery of . . . the amount paid."

[9] *Childress* v. *Emory*, 8 Wheat. 641, 669; *Blake* v. *McKim*, 103 U. S. 336, 26 L. Ed. 563; *Coal Co.* v. *Blatchford*, 11 Wall. (78 U. S.) 172, 20 L. Ed. 179; *Hess* v. *Reynolds*, 113 U. S. 73, 5 Sup. Ct. 377; *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237, 7 Sup. Ct. 193; *Mexican Cent. Ry. Co.* v. *Eckman*, 187 U. S. 429, 23 Sup. Ct. 211.

[10] *State of Indiana* v. *Glover*, 155 U. S. 513, 15 Sup. Ct. 186.

III. The Federal district court had jurisdiction because this is an action arising under an internal revenue law

Title 28, section 41(5) of the United States Code provides that:

> "The district courts shall have original jurisdiction . . . of all cases arising under any law providing for internal revenue."

This provision conferred jurisdiction over this action on the district court, for this is a case arising under a law providing for internal revenue.

The term "internal revenue" is probably found in this country only in Congressional enactments. It designates taxes such as income, estate, inheritance, sales and manufacturers taxes, and its purpose is to distinguish such taxes from import taxes. As the States may not impose import taxes whereas Congress may, all State taxes are internal revenue taxes whereas not all Federal taxes are.

The section (41(5)) does not confine itself expressly to Federal internal revenue taxes; on the contrary it applies to "*all* cases arising under *any* law providing for internal revenue." Thus the section grants jurisdiction to the district courts over cases arising under State laws providing for internal revenue.

The only ground on which a conclusion contrary to the foregoing one could be reached would be that the term "internal revenue" when used by Congress refers only to Federal taxes. This restric-

tive interpretation is refuted, however, by the fact that Congress uses the term "internal revenue" in relation to the taxes imposed by the Territories. Thus in section 3 of the Organic Act of Puerto Rico, 44 Stats. 1418,[11] Congress referred to the Territorial tax laws of the Territorial government as "internal revenue" laws. This demonstrates that in using the term "internal revenue" in section 41(5) Congress was not using a term restricted by custom to Federal taxes. The term is applicable and is used by Congress with regard to taxes imposed by Territorial legislatures. As States and Territories are comparable in this connection, it follows that "internal revenue" legislation includes State tax legislation. Thus the California income tax law is a "law providing for internal revenue," and this action, arising under it, is an action over which the district court had jurisdiction.

IV. The Federal district court had jurisdiction because the full faith and credit clause of the United States Constitution compelled it to exercise jurisdiction

Article IV, Section 1 of the United States Constitution, commonly known as the full faith and credit clause, provides as follows:

> "Full faith and credit shall be given in each State to the public acts, records, and judicial

[11] The pertinent portions of this act and of a Congressional report regarding it are set forth in a footnote in the report of *West India Oil Co.* v. *Domenech*, 311 U. S. 20, at pp. 30 and 31, 61 Sup. Ct. 90, and also in the Appendix to this brief.

proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

This provision applies to State statutes and judgments alike,[12] and consequently the provisions of State statutes are entitled to full faith and credit in the courts of other States and also in Federal courts sitting in other States.[13] Tax laws are not penal laws, and therefore they are within the scope of the full faith and credit clause.[14] Thus the California Personal Income Tax Act is entitled to full faith and credit in the Federal court sitting in Nevada.

The effect of the full faith and credit clause is, of course, to compel the State and Federal courts to enforce obligations created by statutes of other States. Thus the Federal courts must enforce the tax obligation which the California Personal Income Tax Act imposed on Appellee.

The authority to institute this action which is bestowed by California statute[15] on the commissioner is entitled to full faith and credit. The authority to sue in courts of other States, bestowed

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[12] *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 52 Sup. Ct. 571; *Broderick* v. *Rosner*, 294 U. S. 629, 55 Sup. Ct. 589. See also, *Chicago & Alton R. R.* v. *Wiggins*, 119 U. S. 615, 662, 7 Sup. Ct. 398; *Converse* v. *Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415; *Clark* v. *Williard*, 292 U. S. 112, 54 Sup. Ct. 615; *John Hancock Mutual Life* v. *Yates*, 299 U. S. 178, 57 Sup. Ct. 129.

[13] *Bradford Electric Light Co.* v. *Clapper*, supra, Note 12; *Milwaukee County* v. *M. E. White Co.*, supra.

[14] *Milwaukee County* v. *M. E. White Co.*, supra; 28 *Cal. Law Rev.* 507. The latter source contains an excellent recent survey of the problem and of the authorities bearing upon it.

[15] Supra, Note 1.

by State laws on State officers and State appointed receivers, has been held by the United States Supreme Court to be an authority which the courts of the other States are bound by the full faith and credit clause to recognize.[16] As the Federal courts are also bound by the full faith and credit clause,[17] it follows that the Federal courts may not refuse to recognize the commissioner's capacity to sue.

Moore v. *Mitchell,* 281 U. S. 18, 50 Sup. Ct. 175, is somewhat inconsistent with the conclusion expressed above. However, *Moore* v. *Mitchell* did not consider the effect of the full faith and credit clause, and is inconsistent with later decisions in which the United States Supreme Court held that the capacity of a State officer to sue, bestowed by State law, is entitled to full faith and credit.[18] The decision in *Moore* v. *Mitchell* is likewise inconsistent with the later decisions of *Milwaukee County* v. *M. E. White, supra,* and *Massachusetts* v. *Missouri,* supra, both of which recognized that a State authority may sue to collect taxes in the Federal courts sitting in other States. *Moore* v. *Mitchell* must be regarded as impliedly overruled. However, it may be distinguished from the instant case by the fact that the Indiana statute involved in *Moore* v. *Mitchell* did not expressly authorize bring-

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[16] *Converse* v. *Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415; *Clark* v. *Williard*, 292 U. S. 112, 54 Sup. Ct. 615; *Broderick* v. *Rosner*, 294 U. S. 629, 55 Sup. Ct. 589.

[17] See cases cited supra, Note 13.

[18] *Clark* v. *Williard* and *Broderick* v. *Rosner*, supra, Note 16, are more recent decisions than *Moore* v. *Mitchell.*

ing suit in other States, whereas the California statute does.

Congress may not create courts otherwise competent and refrain from giving them jurisdiction over actions of this nature.[19] Thus if Congress made a positive effort to withdraw from its courts jurisdiction over actions to collect State taxes, while at the same time it vested those courts with jurisdiction over actions to collect Federal taxes and with jurisdiction over all suits institued by he United States or an officer thereof, that effort would be unavailing. The full faith and credit clause would compel the Federal courts to exercise jurisdiction in this case, since they are competent to enforce revenue laws and to enforce claims of sovereigns. Therefore even if section 41 of Title 28 could not be construed to have conferred jurisdiction over this action on the Federal district court, the full faith and credit clause would confer that jurisdiction.

V. This Court has jurisdiction of the appeal

Under Title 28, section 225(a) of the United States Code this Court has jurisdiction of all appeals from the Federal district courts except those appeals which go directly to the United States Supreme Court. This case is not of the class in which appeal lies directly to the Supreme Court, so this Court has jurisdiction of the appeal.

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[19] *Kenney* v. *Supreme Lodge*, 252 U. S. 411, 40 Sup. Ct. 371; *Broderick* v. *Rosner*, 294 U. S. 629, 55 Sup. Ct. 589.

B. Appellee owes the tax which this action was instituted to collect

I. California had jurisdiction to impose the tax

The district court concluded that Appellee did not owe any tax to California, apparently because that court was of the opinion that California lacked jurisdiction to tax since Appellee became a nonresident of California shortly before he received the actual proceeds of his winnings. (Record, pp. 92 and 93.) If the district court's conclusion were correct, the path to widespread avoidance of State income taxes would be opened wide.

To appreciate fully the effect of the district court's decision, the essential facts should be briefly reviewed. Appellee and his wife were residents of California in 1936 when Appellee bought a ticket in the Irish Sweepstakes, when the race was run and when Appellee's horse won the race, entitling the holder of the ticket to the first prize of $150,000. Later, in 1937 and about a month and a half before the winnings were actually paid to Appellee, he and his wife left California and established their residence in Nevada. Thus at the time when Appellee's income came into being he was a resident of California.

California had jurisdiction to tax Appellee in 1936 and until May 10, 1937 on all his income,

including any from other States or countries.[20] California could have taxed Appellee in 1936 on income which had accrued to him but which had not yet been paid to him. The winnings from the Irish Sweepstakes could properly have been treated by California as accrued income in 1936 when the race was run and the holder of the ticket (Appellee) became entitled to the proceeds.[21] Thus California could have taxed Appellee in 1936 on his winnings.

Having had jurisdiction to impose an income tax on Appellee's winnings at the time when they first became income,[22] California did not lose jurisdiction to tax merely because it conditioned the imposition of the tax on an event which occurred in another State,[23] or because the tax was not assessed until Appellee had become a resident of another State.[24] Thus the tax is one which California had jurisdiction to impose on Appellee.

The jurisdiction to impose this tax on Appellee is likewise supported by the rule that a State can tax nonresidents on their income derived from

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[20] *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 52 Sup. Ct. 556; *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 57 Sup. Ct. 466.

[21] The accrual in this case as of the completion of the running of the race is clearer and more in accord with recognized accounting concepts of accrual than were the accruals in the cases of *Helvering* v. *Enright Estate*, __ U. S. __, 61 Sup. Ct. 777, and *Pfaff et al.* v. *Com'r.*, __ U. S. __, 61 Sup. Ct. 783. Yet jurisdiction to tax as accrued income was upheld in these cases. Likewise, the case for the accrual of these winnings in 1936 is clearer than the accrual in *Fawcus Machine Co.* v. *U. S.*, 282 U. S. 375, 51 Sup. Ct. 144.

[22] See cases cited supra, Note 21.

[23] *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 61 Sup. Ct. 246.

[24] *Scobie* v. *Wis. Tax Comm.*, 225 Wis. 529, 275 N.W. 531; see also *Continental Assurance Co.* v. *State of Tenn.*, 311 U. S. 5, 61 Sup. Ct. 1, and *Wisconsin* v. *J. C. Penney Co.*, supra, Note 23.

within its borders.[25] The income of Appellee from the Irish Sweepstakes ticket may be regarded as being in this category, for it matured or accrued at the time that the race was run, and a that time the ticket was in California. The ticket was the source of the income, because income does not exist in the abstract but only by identification with its owner or recipient, and Appellee would not have received this income had he not possessed the ticket.[26] The ticket, property in California, created income, because it gave the holder the right to certain proceeds which constituted income. (Cf. *Miller* v. *McColgan,* 17 A. C. 466, 110 Pac. (2) 419.) This income California had jurisdiction to tax even though paid to a nonresident.[27] In this aspect the case is not materially different from a case where a nonresident owns certain tangible personal property in California, such as a diamond ring, which he sells for a profit. Clearly that profit would be taxable by California.

We believe the instant case is in all aspects comparable to one where a resident of California sells a diamond ring located in California, and then

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[25] *Shaffer* v. *Carter*, 252 U. S. 37, 40 Sup. Ct. 221; see also *Hughes* v. *Spaeth*, 207 Minn. 577, 292 N.W. 194, and *Jackling* v. *State Tax Comm.*, 40 N. Mex. 241, 58 Pac. (2) 1167.

[26] The possessor of the ticket was entitled to the winnings. Under Irish law the holder of the ticket is entitled to the winnings regardless of whether he was the original purchaser and regardless of contracts to the contrary between the holder and third parties if the purchase of the ticket and the formation of contracts regarding it are unlawful were made. *Apicella et al.* v. *Scala*, Irish High Court, Record pp. 44, 69, 81, 84. Such purchases and contracts are unlawful in California (Penal Code Sections 319-326, 337a(6) and confer no rights enforceable in the California courts. *People* v. *Rosen*, 11 Cal. (2) 147, 78 Pac. (2) 727.

[27] *Shaffer* v. *Carter*, supra, Note 25, and *N. Y. ex rel Whitney* v. *Graves*, 299 U. S. 366, 57 Sup. Ct. 237.

removes to Nevada and causes the proceeds to be paid to him there. We believe that in such a case California could show jurisdiction to tax both because of its power to tax all the income of residents and because of its power to tax income of nonresidents from sources within its borders. In the instant case California has the same jurisdiction to tax.

II. The California Personal Income Tax Act imposed the tax in the amount assessed

Although Appellee's income came from a transaction made unlawful by California law[28] this income nevertheless constituted taxable income within the definition of income in the Personal Income Tax Act. Section 7(a) of that act defines gross income[29] in substantially the same terms as section 22(a) of the Internal Revenue Code.[30] The definition of gross income in the Federal act has been held to include illicit gains,[31] and the California statute is to be interpreted similarly.[32]

Section 5 of the act imposes a tax on the "entire net income of every resident" of California and on the "net income of every nonresident which is

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[28] Penal Code sections 319-326, 337a(6), and section 3 of Act 3421, Deerings General Laws. These are set forth in the Appendix. See also *People* v. *Torrey*, 16 Cal. App. (2) 470, 60 Pac. (2) 900.

[29] The text of this section may be found in the Appendix.

[30] The similarity of the State and Federal acts has been commented on by the California Supreme Court in *Holmes* v. *McColgan*, 17 A. C. 460, 110 Pac. (2) 428.

[31] *U. S.* v. *Sullivan*, 274 U. S. 259, 47 Sup. Ct. 607, 51 A.L.R. 1020.

[32] The *Sullivan* case was decided in 1927 and the California act was enacted in 1935. Under these circumstances the California courts regard themselves bound by the Federal interpretation. *Union Oil Associates* v. *Johnson*, 2 Cal. (2) 727, 43 Pac. (2) 291, 98 A.L.R. 1499; *Holmes* v. *McColgan*, 17 A. C. 460, 110 Pac. (2) 428.

derived from sources within" California. As the discussion in the preceding division of this brief demonstrates, Appellee is taxed both because income accrued to him while he was a resident and because he received income which was produced by property located in California at the time that it produced the income.

The tax which was assessed against Appellee was in the amount of $4,345.84, on a net income of $70,000. The recovery prayed in the complaint is for the amount of the tax, plus additions for Appellee's failure to pay it on time.

The amount of the assessed tax is not too high; in fact, if it is incorrect at all the assessment is too low.

The ticket held by Appellee was on the winning horse, and the holder of the ticket became entitled to $150,000. The entire $150,000 could well have been regarded as taxable income to Appellee, although he did not in fact receive that much.

The selling of the ticket was in violation of the law of California and under California law Appellee acquired nothing which the courts of California would enforce.[33] Thus had Appellee lost the ticket or had it been stolen, he would not have been entitled to relief in the California courts. By the same token, however, the New York syndicate to whom Appellee assigned half his rights acquired

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[33] *Gridley* v. *Dorn*, 57 Cal. 78; *People* v. *Rosen*, 11 Cal. (2) 147, 78 Pac. (2) 727; *Sloss* v. *Holland*, 38 Cal. App. 318, 177 Pac. 72; *Niccoli* v. *McClelland*, 21 Cal. App. (2) (Supp.) 759, 65 Pac. (2) 853; *Asher* v. *Johnson*, 26 Cal. App. (2) 403, 79 Pac. (2) 457.

nothing under the law of California, for Appellee retained possession of the ticket. Neither did the New York syndicate acquire any rights enforceable under the law of New York.[34]

Under these circumstances the law of Ireland is that the possessor of the ticket (Appellee) became entitled to the entire proceeds, in this case $150,000, and he, and he alone could have enforced his rights to those proceeds in the Irish courts.[35] Thus the New York syndicate did not receive the $75,000 because it had an enforceable right to that sum but only because Appellee permitted the syndicate to receive it. The entire sum to which Appellee had an enforceable right constituted income to him even though he permitted some of it to be paid to another.[36] Appellee is thus taxable on the entire winnings even though he made a gift of half of it to the syndicate by permitting the syndicate to collect half.

Even if the $150,000 which constituted income to Appellee as holder of the ticket were regarded as community income, half of it or $75,000 would be taxable to Appellee, and as the assessment was on $70,000 the assessment is not too high.

However, none of the winnings constituted community income. Although the ticket may have

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[34] *Goodrich* v. *Houghton*, 134 N. Y. 115; 31 N.E. 516; *Thatcher* v. *Morris*, 11 N. Y. 437, III N. Y. Ct. App. Rep. 123; *Rolfe* v. *Delmar*, 30 N. Y. Super. 80.

[35] *Apicella et al.* v. *Scala et al.*, High Court of Ireland, Record p. 44.

[36] *Lucas* v. *Earl*, 281 U. S. 111, 50 Sup. Ct. 241; *Burnet* v. *Leininger*, 285 U. S. 136, 52 Sup. Ct. 345; *O'Donnell* v. *Com'r.*, 64 Fed. (2) 634; *Helvering* v. *Horst*, 311 U. S. 112, 61 Sup. Ct. 144; *Helvering* v. *Eubank*, 311 U. S. 122, 61 Sup. Ct. 149.

been community property, it was in the name and possession of Appellee and therefore under Irish law he was entitled to the proceeds to the exclusion of his wife.[37] Thus the proceeds were his separate income taxable to him as such. This conclusion is not shaken by the fact that when Appellee received the proceeds his wife thereupon acquired community property rights which she might be able to enforce against Appellee in Nevada.[38] Thus Appellee was taxable on the winnings as separate income, not as community income. He was therefore taxable on $150,000 if the amount paid to the New York syndicate be treated as a gift, and otherwise he was taxable on $75,000. In either event, the assessment was lower so any error is in Appellee's favor.

Neither the payments to the syndicate, to Leathe nor to the attorneys were deductible as business expenses, for Bruce was not engaged in a business of buying Sweepstakes tickets.[39] Therefore no deductions could be taken to reduce the taxable net income below the $70,000 which was included in the assessment.

From the foregoing it may be seen that the assessed tax is imposed by the act.

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[37] *McKie* v. *Rt. Hon. Earl of Granard*, Irish High Court, Record p. 14.

[38] See cases cited supra Note 36, in each of which the same was true of the income involved. See also *Clifford* v. *Helvering*, 309 U. S. 331, 60 Sup. Ct. 554.

[39] *Van Wart* v. *Com'r.*, 295 U. S. 112, 55 Sup. Ct. 660; *Higgins* v. *Com'r.*, 312 U. S. 212, 61 Sup. Ct. 475.

C. The reports of the Irish cases should have been admitted into evidence

At the trial, Appellant offered in evidence the reports of the Irish cases of *Apicella et al.* v. *Scala et al.* and *McKie* v. *Rt. Hon. the Earl of Granard,* which are reproduced on pages 44 and 14, respectively, of the Transcript of Record. The proceedings in this connection at the trial are set forth from page 9 to page 12 of the Transcript of Record. Commencing on page 10 it appears that Mr. Linney, acting for Appellant, offered the reports in evidence. Mr. Johnson, attorney for Appellee, on the ground that "under the procedure in Nevada" one cannot "read any law to the jury," objected "to the introduction as evidence in this case [of] any decisions of courts of Ireland or any other foreign country." Mr. Linney then stated that the evidence was offered because the court would not take judicial notice of Irish law. The court then stated that the cases "could be considered better as a question of law." Subsequently the cases were received for identification, but the court did not permit them to be admitted in evidence.

It is well settled that the Federal courts do not take judicial notice of the law of foreign countries and hence such law must be proved.[40] While it is not easy to tell precisely what Appellee's attorney

[40] *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 445, 9 Sup. Ct. 469; *Coghlan* v. *So. Car. R. R. Co.*, 142 U. S. 101, 12 Sup. Ct. 150; *The Silverpalm*, 79 Fed. (2) 598; *Merinos Viesca Y. Co.* v. *Pan. Am. etc. Co.*, 83 Fed. (2) 240, cert. den. 299 U. S. 547, 57 Sup. Ct. 10; *In re Hannevig*, 10 Fed. (2) 941, cert. den. 270 U. S. 655, 46 Sup. Ct. 353.

meant by his objection that "under our procedure in Nevada we are [not] permitted to read any law to the jury," presumably he meant that the court should take judicial notice of the Irish law and therefore proof of it was unnecessary. After making such an objection, Appellee would not be in a position to object to this Court's taking judicial notice of Irish law. However, the objection should have been overruled and the evidence received since the rule is clear that judicial notice may not be taken of foreign law. On appeal this Court may, of course, consider improperly excluded evidence the same as if such evidence had in fact been admitted, so the cases offered in evidence may be considered as proving the Irish law pertinent herein.

CONCLUSION

This action, to collect State taxes, is within the jurisdiction of the Federal courts and is properly before this Court. The tax which is involved was imposed by a valid statute of California, and is a tax which California had jurisdiction to impose. Therefore the tax obligation should be enforced. Judgment should have been for Appellant as prayed in the complaint; therefore the judgment in favor of Appellee should be reversed.

Respectfully submitted.

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APPENDIX

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CALIFORNIA PERSONAL INCOME TAX ACT

Sec. 7. (a) Gross income includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, and includes any salary, wages or compensation of any officer or employee of this State, or any political subdivision, district or municipality thereof.

PENAL CODE OF CALIFORNIA

Sec. 319. A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift-enterprise, or by whatever name the same may be known.

Sec. 320. Every person who contrives, prepares, sets up, proposes, or draws any lottery, is guilty of a misdemeanor.

Sec. 321. Every person who sells, gives, or in any manner whatever, furnishes or transfers to

or for any other person any ticket, chance, share, or interest, or any paper, certificate, or instrument purporting or understood to be or to represent any ticket, chance, share, or interest in, or depending upon the event of any lottery, is guilty of a misdemeanor.

Sec. 322. Every person who aids or assists, either by printing, writing, advertising, publishing, or otherwise in setting up, managing, or drawing any lottery, or in selling or disposing of any ticket, chance, or share therein, is guilty of a misdemeanor.

Sec. 323. Every person who opens, sets up, or keeps by himself or by any other person, any office or other place for the sale of, or for registering the number of any ticket in any lottery, or who, by printing, writing, or otherwise, advertises or publishes the setting up, opening, or using of any such office, is guilty of a misdemeanor.

Sec. 324. Every person who insures or received any consideration for insurance for or against the drawing of any ticket in any lottery whatever, whether drawn or to be drawn within this state or not, or who receives any valuable consideration upon any agreement to repay any sum, or deliver the same, or any other property, if any lottery ticket or number of any ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not be drawn, at any particular time or in any particular order, or who promises or agrees to pay any sum of money, or to deliver any goods, things in action, or property, or to forbear to do anything for the benefit of any person, with or without consideration, upon any event or contingency dependent on the drawing of any ticket in any lottery, or who publishes any notice or proposal

of any of the purposes aforesaid, is guilty of a misdemeanor.

Sec. 325. All moneys and property offered for sale or distribution in violation of any of the provisions of this chapter are forfeited to the state, and may be recovered by information filed, or by any action brought by the attorney-general, or by any district attorney, in the name of the state. Upon the filing of the information or complaint, the clerk of the court, or if the suit be in a justice's court, the justice, must issue an attachment against the property mentioned in the complaint or information, which attachment has the same force and effect against such property, and is issued in the same manner as attachments issued from the district courts in civil cases.

Sec. 326. Every person who lets, or permits to be used, any building or vessel, or any portion thereof, knowing that it is to be used for setting up, managing, or drawing any lottery, or for the purpose of selling or disposing of lottery tickets, is guilty of a misdemeanor.

Sec. 337a. (6) Who lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus,

Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year.

This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every

person or persons who may do in a single instance any one of the acts specified in said subdivisions 1 to 6 inclusive.

DEERING'S GENERAL LAWS—ACT 3421

Sec. 3. Said racing board shall have full power to prescribe rules, regulations and conditions consistent with the provisions of this act under which all horse races, upon the results of which there shall be wagering, shall be conducted within the State of California. Said board shall make rules governing, permitting and regulating mutual wagering on horse races under the system known as parimutuel method of wagering, which shall be conducted only by such licensee and only within the enclosure and only on the dates for which such horse racing has been licensed by the board. A wager made inside an enclosure under the parimutuel system for a principal who is not within the enclosure shall be considered a wager made within the enclosure for the purpose of this act and any activity of the principal in connection with such wager shall not be considered a wager made outside the enclosure. All other forms of wagering or betting on the result of a horse race shall be and remain illegal and any and all wagering or betting on horse races outside the enclosure where such horse races shall have been licensed by the board shall be and remain illegal.

Licenses. All horse owners, riders, agents, trainers, stewards, starters, timers, judges and others acting as officials at any such racing meeting shall be licensed by the board, pursuant to such rules and regulations as the board may adopt, and by

the payment of a license fee as fixed and determined by said board. All licenses shall be granted for a period of one year and shall be valid at all race meetings in said State during said period. Said licenses shall be subject to revocation and no person shall be eligible to, or permitted to participate in such racing unless so licensed, and only during the time such license remains unrevoked. No qualified person shall be refused such license, nor shall such license be revoked without just cause.

Powers of board. Said board shall have power to compel the production of any and all books memorandum or documents showing the receipts and disbursements of any person, corporation or association licensed under the provisions of this act to conduct race meetings. The board may at any time require the removal of any employee or official employed by any licensee hereunder in any case where it shall have reason to believe that such employee or official has been guilty of any dishonest practice in connection with horse racing and has failed to comply with any condition of such licensee's license, or has violated any law or any rule or regulation of said board. The board shall also have the power to require that the books and financial or other statements of any person, corporation or association licensed under the provisions of this act shall be kept in any manner which to the board may seem best, and the board shall also be authorized to visit, investigate, and place expert accountants and such other persons as it may deem necessary in the offices, tracks or places of business of any such person, corporation or association, for the purpose of satisfying itself that the board's

rules and regulations are strictly complied with. The said board shall have power to summon witnesses before it and to administer oaths or affirmations to such witnesses whenever, in the judgment of the board, it may be necessary for the effectual discharge of its duties; and any person failing to appear before said board at the time and place specified in answer to said summons or refusing to testify, shall be deemed guilty of a misdemeanor and, upon conviction in a court of competent jurisdiction, shall be punishable by a fine of not more than five hundred dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court.

SENATE REPORT, No. 1011, 69th Cong., 1st Sess., p. 2:

"In making use of the authority granted by section 3 to levy and collect internal-revenue taxes the government of Porto Rico has found itself unable to collect said taxes on articles purchased in and sent from the United States to Porto Rico by mail, or sometimes when said articles are sent by vessel, as the courts have held that the post-office or customs officials have no authority to withhold [the] delivery of such articles subject to the internal-revenue tax until the tax is paid, as such tax collected in this manner is in effect a customs duty. In other words, the courts have held that the internal-revenue tax can not be collected while the article subject to the tax is in the original package.

"This condition of affairs has practically nullified the power of the insular government to levy

internal-revenue taxes, and therefore the efficacy of this source of revenue has been seriously impaired.

"For the purpose of righting this situation, a new provision is added to section 3, which states as follows:

> '*And it is further provided,* That the internal-revenue taxes levied by the Legislature of Porto Rico in pursuance of the authority granted by this act on articles, goods, wares, or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used, or brought into the island: *Provided,* That no discrimination in rates be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Porto Rico. The officials of the Customs and Postal Services of the United States are hereby directed to assist the appropriate officials of the Porto Rican government in the collection of these taxes.'

"It is expected that the government of Porto Rico will so make use of this power as not to unnecessarily place any barriers in the way of the free-trade conditions now existing between Porto Rico and the mainland, which is the principal factor in the progress and prosperity of Porto Rico."

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